Supreme Court, U.S.
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No. 97-1078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CATHERINE A. GHIGLIERI,
TEXAS BANKING COMMISSIONER, PETITIONER

v.

NATIONSBANK, N.A., *ET AL.*, RESPONDENTS

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

BRIEF FOR RESPONDENT NATIONSBANK, N.A., IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals in two separate opinions correctly upheld decisions of the Office of the Comptroller of the Currency interpreting a provision of the National Bank Act — which was amended and has no prospective effect after June 1, 1997 — as permitting national banks to relocate their main offices without divesting their existing branches?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 LISTINGS

The parties to the proceeding below were:

Catherine A. Ghiglieri, Texas Banking Commissioner
Eugene Ludwig, Comptroller of the Currency
Sun World, National Association
Commercial National Bank of Texarkana

At the time of the proceedings below, Sun World, National Association, was a wholly-owned subsidiary of NationsBank Texas Bank Corporation, Inc., which in turn is a direct subsidiary of NB Holdings Corporation and an indirect subsidiary of NationsBank Corporation. On January 15, 1998, Sun World was merged into respondent NationsBank, National Association, which is a direct subsidiary of NB Holdings Corporation and an indirect subsidiary of NationsBank Corporation.

The nonwholly owned subsidiaries of NationsBank, N.A., NB Holdings Corporation or NationsBank Corporation are:

206 East Redwood Street Partnership
BBI Merchant Processing Company, LLC
Boatmen's Merchant Processing Company, LLC
Carrolltowne Center Associates Limited Partnership
Cedar Mill, LLC
Community Reinvestment Group, L.C.
Education Financing Services, LLC
First Housing Development Corporation of Florida
Fountain Square Joint Venture

Gartmore Global Partners
Integrion Financial Network, LLC
MECA Software L.L.C.
Montgomery Homes Limited Partnership II
NationsBanc Mortgage Corporation
NationsBank CLO Corporation
Savannah Community Development Corporation dba
Savannah Regional Small Business Capital Fund
Third Ward Neighborhood Development Association
Unified Merchant Services
Washington View (H) Corporation
Washington View (NH) Corporation

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No. 97-1078

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CATHERINE A. GHIGLIERI,
TEXAS BANKING COMMISSIONER, Petitioner

v.

NATIONSBANK, N.A., et al., Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT NATIONSBANK, N.A., IN OPPOSITION[1/]

Petitioner ("Texas Commissioner") seeks review of two decisions of the U.S. Court of Appeals for the Fifth Circuit interpreting the National Bank Act, 12 U.S.C. § 30(b). That section was amended, effective June 1, 1997, thus guaranteeing that the issues raised here will not arise in the future. Moreover, the court of appeals faithfully applied this Court's decision in *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984), and its progeny in upholding the interpretation of the National Bank Act by the Office of the Comptroller of the

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1/ As explained at p. ii supra, NationsBank, N.A., on January 15, 1998, acquired Sun World, N.A. by merger.

Currency ("OCC"). The decisions of the court of appeals are correct and do not conflict, either in their reasoning or in their result, with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

OPINIONS BELOW

The opinion of the court of appeals in *Ghiglieri* v. *Sun World, N.A.* is reported at 117 F.3d 309 (5th Cir. 1997), and is reproduced in the Appendix to the Petition at A-1.[2/] The opinion of the district court in that case (App. C-1) is reported at 942 F. Supp. 1111 (W.D. Tex. 1996). The opinion of the OCC at issue in *Sun World* is reproduced at App. E-1.

The opinion of the court of appeals in *Ghiglieri* v. *Ludwig* (App. B-1) is reported at 125 F.3d 941 (5th Cir. 1997). The opinion of the district court in that case (App. D-1) is not reported. The opinion of the OCC at issue in *Ludwig* is reproduced at App. F-1.

JURISDICTION

The judgment of the court of appeals in *Ghiglieri* v. *Sun World, N.A.*, was entered on July 22, 1997. A petition for rehearing and a suggestion for rehearing en banc were denied on September 25, 1997. (App. G-1). The judgment of the court of appeals in *Ghiglieri* v. *Ludwig* was entered on October 29, 1997. The petition for a writ of certiorari was filed on December 23, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

[2/] The pages in the Appendix to the Petition will be cited as (App. __-__).

STATEMENT

1. Under 12 U.S.C. § 30(b), the statute in effect at the time of the actions in this case, the OCC was authorized to approve national bank main office relocations of less than 30 miles, whether within the same state or across a state line. In acting upon the application of Sun World, National Association ("Sun World") to relocate its main office less than three miles from El Paso, Texas, to Santa Teresa, New Mexico, the OCC observed that "[i]n many years of administering main office relocations under [§] 30, [it] ha[d] not required [the filing of] new branch applications for [retaining] existing branches." (App. E-48-49).

The OCC noted that, as early as 1981, it had allowed the intrastate relocation of a main office with the retention of existing branches, even when opposed by a state banking regulator. (App. E-28 n.11). It also observed that Sun World's application was "similar to a number of prior interstate relocation and branching applications approved by the OCC in more recent years." (App. E-12). Finally, the OCC discussed relevant case law where at least four courts had rejected arguments, like those made by the Texas Commissioner, that state law should limit national bank main-office relocations. (App. E-18-24).[3/] Accordingly, on August 2, 1996, the OCC approved Sun World's relocation of its main office to New Mexico, without requiring the bank to

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[3/] *Ramapo Bank* v. *Camp*, 425 F.2d 333 (3d Cir. 1970); *Traverse City State Bank* v. *Empire National Bank*, 228 F. Supp. 984, 992 (W.D. Mich. 1964); *First National Bank & Trust Co.* v. *Smith*, No. K75-19 (W.D. Mich. Sept. 28, 1977); *Merchants & Miners Bank* v. *Saxon*, No. 1042 (W.D. Mich. July 13, 1966).

divest its existing Texas branches. (App. E-1).[4/]

Had the OCC acted upon Sun World's application a year later, it would have reached a different result. In the 1994 "Riegle-Neal" amendments to the National Bank Act, Pub. L. No. 103-328, 108 Stat. 2338, 2350 (adding 12 U.S.C. § 30(c)), Congress amended § 30 to provide that national banks relocating their main offices across state lines could retain their existing branches only if those branches could be reestablished in accordance with state law. However, Congress expressly provided that this new restriction would apply only to the "relocat[ion] [of] the main office of such [national bank] from 1 state to another state *after May 31, 1997*." *Id.* (emphasis added).

The legislative history of § 30(c) recognized that the OCC

> has used the 30 mile relocation provision of [§ 30(b)] to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the main offices.

H.R. Conf. Rep. No. 103-651, at 57 (1994). The conferees then stated that they were

> amend[ing] the provision so that *after June 1, 1997*, a national bank relocating its main office to another state may maintain its branches in the first state only if those branches could have been established by a bank with its home state in the new State.

[4/] The OCC also granted Sun World's concurrent application under 12 U.S.C. § 36(c) to open a new branch at the site of its former El Paso main office. (App. E-73-74, E-84).

Id. (emphasis added). In their concluding remarks, the conferees stated that they were:

> aware of the OCC procedures in permitting relocation across state lines. The Conferees concur[red] with those procedures, including the application of appropriate State law and authority. *The Conferees expect the OCC to continue to follow those procedures until the provisions of Title I become fully applicable on June 1, 1997.*

Id. (emphasis added).

2. The Texas Commissioner disagreed with the OCC's interpretation of § 30(b) of the National Bank Act as allowing banks to relocate their main offices across state lines prior to June 1, 1997, without losing their branches. She argued that under the Act, 12 U.S.C. §§ 36(a) & (b), banks could retain existing branches only in the limited circumstances specified in those provisions. Accordingly, she filed suit in the District Court for the Western District of Texas seeking to invalidate the OCC's decision. (The Texas Commissioner had successfully pursued a similar action against another bank in the Northern District of Texas. (App. D-1)). The district court in the *Sun World* case followed the decision of the Northern District of Texas and on October 29, 1996, granted summary judgment for the Texas Commissioner. (App. C-1).

3. Sun World and the OCC appealed to the Fifth Circuit. On July 22, 1997, that court (Judges Jolly, Duhé & Emilio M. Garza) vacated the district court's decision and remanded the case for entry of judgment upholding the OCC's construction of § 30(b) of the National Bank Act as allowing Sun World to retain its existing Texas branches after relocating its main office to New Mexico. (App. A-1). Finding it "plain" that the 'statute is silent" on the issue of

branch retention for main office relocations prior to June 1, 1997 (App. A-6), the lower court concluded that under *Chevron* v. *NRDC*, 467 U.S. 837 (1984), and *NationsBank* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995), the OCC's interpretation of the National Bank Act should be given "controlling weight," if it represents a "reasonable" interpretation of the statute (App. A-5).

The lower court concluded that the OCC's interpretation of the Act was reasonable for three separate reasons. First, "the Commissioner's position would result in a deprivation of lawfully acquired property interests [*i.e.*, existing branches] without express statutory authority." (App. A-7). Second, the restrictions on branch retentions imposed by § 30(c) after May 31, 1997, "indirectly support[] the [OCC's] position," since "the imposition of a Congressional limitation on a national bank's authority is logical only if the banks already had the authority," citing *NationsBank*, 513 U.S. at 257-59. (App. A-7). Third, the legislative history of the 1994 amendments to the National Bank Act adding that limitation (see pp. 4-5, *supra*) "suggests that Congress indeed viewed the practice of allowing retention of branches upon relocation under § 30(b) favorably and did not intend to end the practice until the effective date" of those amendments. (App. A-8).[5/]

On October 29, 1997, another panel of the Fifth Circuit (Judges Jolly, Benavides, Reavely concurring) followed the *Sun World* case and reversed the decision of the Northern District of Texas. (App. D-1).

[5/] The court of appeals also rejected the Texas Commissioner's argument that the OCC improperly allowed Sun World to open a new branch at the site of its former main office in El Paso. (App. A-9-10). The Texas Commissioner does not challenge this part of the lower court's decision.

REASONS FOR DENYING THE WRIT

1. The petition in this case challenges the OCC's construction of § 30(b) of the National Bank Act, prior to June 1, 1997 -- the effective date specified in § 30(c) for a new branch retention rule applicable to interstate main office relocations. To date, the only two appellate opinions construing § 30(b) in an interstate relocation context arising prior to June 1, 1997, are the ones challenged in the instant petition.[6/] Because this case concerns the interpretation of a statute that has been amended and will not apply to future transactions, it is a particularly inappropriate vehicle for the exercise of this Court's certiorari jurisdiction. *See Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) (writ dismissed as improvidently granted after new statute ensured that issue would not arise again); Robert L. Stern, et al., *Supreme Court Practice* § 4.4, at 172 (7th ed. 1993).[7/]

[6/] A district court in another circuit has similarly upheld the OCC's construction of § 30(b) in connection with an interstate main office relocation occurring prior to June 1, 1997. *McQueen* v. *Ludwig*, No. 96-00036 (W.D. Mich. Sept. 4, 1997) (unreported), *appeal pending*, No. 97-2005 (6th Cir.).

[7/] The Texas Commissioner's argument that "the problem" raised by this case is not "isolated" (Pet. 15) is unconvincing. Her contention that "numerous branches were established nationwide using the [OCC's] flawed interpretation of [§] 30" (*id.*) is both exaggerated and irrelevant. This Court's acceptance of the Texas Commissioner's view of § 30(b) would almost certainly have no effect upon these other transactions, since they were either unchallenged or decisions rejecting such challenges are now final. The same observation applies to the Texas Commissioner's assertion that the OCC's "interpretation effectively exempts a significant number of national branching networks from [state law] restrictions . . . . [and] thus disrupts the level playing field envisioned by Congress for the dual banking system." (Pet. 15).

2. The decisions below are not in conflict with any prior decisions of this Court or of other circuits. As noted above, no appellate court had decided the issue of branch retention in an interstate main office relocation context until the two decisions of the Fifth Circuit that are challenged in the petition.

There is similarly no conflict with respect to the "doctrine of competitive equality" that the Texas Commissioner argues is embodied in § 36 of the National Bank Act. (Pet. 19). All of the decisions of this Court that the Texas Commissioner cites in support of her "competitive equality" argument concern the establishment of a *new* national bank branch, either directly or by conversion of a state-bank branch to a national-bank branch, *e.g.*, *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924); *First Nat'l Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), or they pertain to conduct by national banks that was challenged as being equivalent to the operation of a new branch, *e.g.*, *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969). Section 36(c) indisputably applies to the establishment of *new* branches, imposing upon national banks limitations derived from applicable state law.[8/] However, the Texas Commissioner cites no decision of this Court where § 36 of the Act — and the purported doctrine of "competitive equality" — have been applied to require a national bank to divest its *existing* branches in a main office relocation or in any other context.

[8/] Accordingly, in ruling upon Sun World's application to establish a new branch at the location of its former main office in El Paso, the Fifth Circuit applied § 36(c) and concluded that the new branch could be established consistent with Texas law. (App. A-9-10). As noted (p. 6, n.5), the Texas Commissioner does not challenge this aspect of the court of appeals' decision.

The court of appeals decisions upon which the Texas Commissioner bases her "conflict" argument similarly fail to support the petition. She concedes (Pet. 24-25) that *Marion Nat'l Bank* v. *Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969), and *Ramapo Bank* v. *Camp*, 425 F.2d 333 (3d Cir. 1970), concerned only the bona fides of a main office relocation. As the Texas Commissioner expressly stated below, "none of these cases involved retaining *existing* branches." (Appee. Br. in *Sun World* at 22, emphasis in original).[9/]

3. The Texas Commissioner mounts a broad-scale attack upon "administrative agencies" as a "headless 'fourth branch' of the Government" (Pet. 13),[10/] and suggests that affording *Chevron* deference to an agency's construction of the statute which it implements, at least in this case, violates "the constitutional framework of separation of powers and considerations of federalism." (Pet. i). This Court has repeatedly applied the *Chevron* doctrine *in reversing* lower courts (including the Fifth Circuit) for failing to give deference to the OCC's construction of the National Bank Act. *See NationsBank*, 513 U.S. 251 (reversing the Fifth Circuit); *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 116 S. Ct. 1730 (1996) (reversing the California Supreme Court).[11/]

[9/] The same observation applies to the Texas Commissioner's reliance on *First Nat'l Bank of Southhaven* v. *Camp*, 333 F. Supp. 682 (N.D. Miss. 1971), *aff'd*, 467 F.2d 944 (5th Cir. 1972). Moreover, this 27-year old decision of a district court in the Fifth Circuit cannot possibly provide the basis for a "conflict" with two later Fifth Circuit decisions.

[10/] The OCC is in the Treasury Department, 12 U.S.C. § 1, and thus is part of the Executive Branch. Unlike the FCC, NLRB, and FTC, it is not an "independent" or "fourth branch" agency.

[11/] The Texas Commissioner's observation that the OCC may not promulgate rules under § 36 of the National Bank Act does not support her

(continued...)

Thus, this case presents a particularly unsuitable vehicle for the type of reconsideration of the *Chevron* doctrine implicit in the Texas Commissioner's arguments.

Certainly, the Texas Commissioner's arguments that there was no ambiguity in the National Bank Act and that the court of appeals "neglected to consider the legislative histories of [§§ 30 & 36] and Riegle-Neal" (Pet. 28) do not justify reexamination of the Fifth Circuit's application of *Chevron*. The court of appeals noted the silence of § 30(b) regarding branch retention (App. A-6), and it was unpersuaded that §§ 36(a) & (b), which permit branch retention in certain limited circumstances, implicitly required the OCC to force banks to divest their existing branches in all of the many other circumstances that fall outside the terms of those provisions (App. A-6, A-15).[12/]

Moreover, the court of appeals carefully examined the most pertinent legislative history — the 1994 Riegle-Neal amendments when Congress for the first time directly addressed the issue of branch retention in a main office

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[11/](...continued)
attack upon the *Chevron* doctrine as applied to the OCC in this case. (Pet. 31). The issue here is whether under § 30(b) a bank was entitled to relocate its main office without losing its branches. The Fifth Circuit did not cite *Chevron* in dealing with the different question under § 36(c) whether the agency correctly allowed Sun World to establish a new branch at the site of its former main office. (App. A-9-10).

[12/] The lower court correctly observed that construing § 30(b) and §§ 36(a) & (b) as requiring branch divestiture when a bank relocates its main office could not be restricted to interstate relocations under § 30(b). *See* App. A-15, rejecting the Texas Commissioner's argument as "nonsensical because, if carried to its conclusion, no relocating national bank had the authority to retain its pre-existing branches even if it simply moved its main office across the street."

relocation context and concluded that "Congress indeed viewed the practice of allowing retention of branches upon relocation under § 30(b) favorably and did not intend to end the practice until [June 1, 1997] the effective date of the Riegle-Neal amendments." (App. A-8).

Finally, the court of appeals' decision set forth at length its rationale for concluding that the OCC's interpretation of the National Bank Act was "reasonable." *See* p. 6, *supra*. The Texas Commissioner has not come close to justifying her request that this Court use its certiorari jurisdiction to review that decision.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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